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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

SEAMPRUFE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Seamprufe, Inc., Petitioner herein, prays that a writ of certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review the decree of that court entered on February 19, 1951, enforcing an order of the National Labor Relations Board (hereinafter called the "Board") dated April 8, 1949, under Section 10 of the National Labor Relations Act as amended.

Opinions Below

The findings of fact, conclusions of law and order of the Board are recorded at 82 N. L. R. B. 892 (1949) (R. 60-70). The opinion of the Court of Appeals is not as yet reported.

Jurisdiction

The decision of the Court of Appeals was filed on January 2, 1951, and its decree was entered on February 19, 1951. Thereafter, on March 9, 1951, Seamprufe filed a petition for rehearing. On March 19, 1951, an order was entered by the Court of Appeals denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

Questions Presented

1. Whether the prosecution of the Board's case against a Union and an agent of a Union, and the Board's case against Petitioner by the same attorney in the same proceeding was contrary to due process.

2. Whether the Court of Appeals erred in failing to apply the broadened scope of court review, provided for in the 1947 amendments to the National Labor Relations Act, when it reviewed said findings and order.

3. Whether the Board's order is supported by substantial evidence on the record considered as a whole.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and its amendments and of the Administrative Procedure Act are set forth *infra* in the appendix.

Statement

In January, 1948, Seamprufe filed its charge against the International Ladies Garment Workers Union and Mavis Lane, representative of the Union (R. 12, 14). Likewise,

in January, 1948, Mavis Lane and the International Ladies Garment Workers Union filed an amended charge against Seamprufe complaining of the discharge of two of Seamprufe's employees, Virginia Romeo Webb and Edna Clendenon, and other alleged unfair labor practices. As set forth *supra,* complaints were issued on each of the charges. The complaints were consolidated and one Board attorney was designated to prosecute each of the cases in the consolidated proceeding.

After issuance of its order against Seamprufe, the Board, on April 17, 1950, petitioned the Court of Appeals for the Tenth Circuit for enforcement. On January 2, 1951, the Court's opinion enforcing the Board's order against the petitioner was filed. The decree enforcing the Board's order was entered on February 19, 1951.

Specification of Errors To Be Urged

The Court erred:

1. In holding that the prosecution of the charges against the Union and Lane and against Seamprufe by the manner in which the hearing was conducted was not a denial of due process.

2. In not applying the broadened scope of court review of Board findings and orders as provided for in the 1947 amendments to the National Labor Relations Act.

3. In enforcing the Board's order.

Reasons for Granting the Writ

The basic question decided by the Court below and presented in the instant petition is an important issue of federal law which has not been, but should be, settled by this Court. Also, the Court of Appeals has failed to adhere to the rule of law regarding review as provided for in the 1947 amendments to the National Labor Relations Act and

the Administrative Procedure Act, and its decision in this case is not in accord with applicable decisions of this Court.

1. At the hearing of the consolidated cases before the Board's Trial Examiner, Mr. Wilson, an attorney appearing on behalf of the Board, prosecuted both the case against the Union and Mavis Lane and the case against Seamprufe.

This unique procedure was not pursuant to any rules or regulations of the Board. In fact, the Board's rules and regulations make no provision for prosecution of cases by a *single* Board attorney where complaints against an employer and a Union are consolidated.

At the hearing Mr. Wilson presented the case against the Union and Mavis Lane after having consulted with Seamprufe's witnesses regarding Seamprufe's charge against the Union and Mavis Lane. When Mr. Wilson began to present the case against Seamprufe in the very same hearing, counsel for Seamprufe vigorously objected to this anomalous procedure, but the objection was overruled (R. 137).

In the course of the hearing Mr. Wilson had to switch, in chameleon-like fashion, from opposition to the Union to opposition against the employer. The full-scale travesty of judicial and quasi-judicial proceedings was so flagrant that at one point in the hearing the attorney for the employer noted that it was difficult "to keep up with Mr. Wilson, whether he is on one side or on the other" and it was not known whether Mr. Wilson was arguing in his behalf or against him (R. 230).

The fantastic procedure resulting from Mr. Wilson's conduct cannot be given the imprimatur of regularity or due process. It violated every sense of decency. The hearing, at times, became farcial. It was an indignity to judicial due process and a blot on the record of an administrative board dedicated to adherence to the principles of proper standards and justice.

A substantial regard for judicial or quasi-judicial standards by administrative boards has been cogently empha-

sized by Chief Justice Hughes in *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937), where he said:

> "• • • in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard' (citing cases)."

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 (1935), Justice Brandeis wrote:

> "The inexorable safeguard which the due process clause assured is • • • that the procedure at the hearing shall be consistent with the essentials of a fair trial."

In reality, Mr. Wilson was advocate for the Union and Mavis Lane, on the one hand, and advocate for the Employer on the other hand.

In *United States* v. *Carter*, 217 U. S. 286, 306 (1909), this Court restated the general rule prohibiting a fiduciary from serving two masters, as follows:

> "And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interest of those he is bound to protect.
>
> "So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

A fortiori does this rule apply to attorneys at law as well as to fiduciaries.

This well-settled rule, enunciated by *United States* v. *Carter, supra,* has been formulated by the various states

in their Professional Codes of Ethics for attorneys.* The rationale of the rule is the protection of clients with adverse interests against a practice which would deprive them of their basic rights to be represented by attorneys who will not be serving two masters, making impossible the maintenance of the essential confidential relationship between attorney and client.

The orderly requirements of due process demand that in a case like the one at bar, where cross-charges of a Union against an Employer and an Employer against a Union are consolidated, a *separate* Board attorney should be designated to prosecute each of the charges in the consolidated cases.

2. Before the Court of Appeals, Seamprufe contended that the Board's order should be vacated because the Board's findings are not supported either by substantial evidence on the record considered as a whole or by a preponderance of testimony.

Seamprufe argued that the Taft-Hartley Act, by amendments of the National Labor Relations Act in 1947, broadened the power of a court's review of a Board order. Seamprufe referred to Section 10(c) of the amended Act which provides that the Board's findings shall be based upon the "preponderance of the testimony". Also reference was made to Sections 10(e) and (f) of the amended Act, which provide that the findings shall be "supported by substantial evidence on the record considered as a whole". The Circuit Court's attention was invited to this Court's decision in the case of *Pittsburgh Steamship Company* v. *National Labor Relations Board,* 337 U. S. 656.

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* E.g.: "It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in the behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose" (Canon No. 6, Canons of Professional Ethics by the Association of the Bar of the City of New York).

Counsel for the Board argued that there was ample basis in the record to sustain the Board's findings and cited cases from the Tenth Circuit Court.

The Court of Appeals concluded that the findings of the Board were supported by substantial evidence. The Court, apparently, applied the limited scope of review that it had applied to cases arising under the National Labor Relations Act before it was amended in 1947. This conclusion is borne out by the case of *Labor Board* v. *Continental Oil Company*, 169 F. 2d 552 (1950), where the Court of Appeals held that no change in the court's scope of review had been made by the Taft-Hartley amendments to the National Labor Relations Act.

In that case the Court of Appeals at page 555 discussed the rule of the scope of review applied by that court as follows:

> "Respondent argues that the change in congressional attitude on labor matters as evidenced by the Taft-Hartley Act should be recognized. It is pointed out that the scope of judicial review of the board's decisions had been enlarged. Section 10(b) of the National Labor Relations Act provided: 'The rules of evidence prevailing in courts of law and of equity shall not be controlling.' In the amendment this provision was written to read: 'Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, * * *' Section 10(e) of the old Act stated: 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' This last provision was changed by the 1947 amendment to read: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' Other than these changes, the law relating to enforcement and review remains the same.
>
> "By these changes Congress may have intended to broaden the scope of judicial review and confer power upon the courts to review the board's findings of fact as well as conclusions of law. If it had such an intent, it failed in the result. The amendments limit the

review to a determination as to whether or not, considering the record as a whole, there is substantial evidence to sustain the finding. *So far as the review is concerned, this leaves us in the same status as before the amendments.* The courts then required the finding to be supported by substantial evidence. *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485; 491. In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, the court said: 'We agree that the statute, in providing "that the findings of the board as to the facts, if supported by evidence, shall be conclusive," means supported by substantial evidence'. The scope of review by the courts since the amendments is carefully discussed by Chief Judge Parker speaking for the Court of Appeals of the Fourth Circuit in *Eastern Coal Corp.* v. *N. L. R. B.*" (Italics ours.)

Thus it is clear that the Circuit Court applied the limited rule of review in the instant case as it had in cases which it reviewed prior to the amendment of the National Labor Relations Act.

This is in direct conflict with a recent decision of this Court in the case of *Universal Camera Corporation* v. *National Labor Relations Board*, ... Sup. Ct., ... (Feb. 26, 1951). In that case this Court held that the scope of court review had been broadened by the amendment of the National Labor Relations Act. Justice Frankfurter declared:

> "The essential issue raised by this case and its companion, *Labor Board* v. *Pittsburgh Steamship Co.*, p. , infra, is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board. • • •
>
> "Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was 'substantial', the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. It is fair to say that by imperceptible steps regard for the fact

finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. * * *

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof to which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof. * * *

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to 'the whole record'. * * *

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. * * *

"The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often 'the art of proliferating a purpose', *Brooklyn National Corp.* v. *Commissioner,* 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed 'substantial evidence' test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

Thus it is clear from the decision in the *Universal Camera* case that the scope of review applied in the instant case was limited and failed to conform with the provisions of the amended National Labor Relations Act and the Administrative Procedure Act.

3. The Court below improperly enforced the Board's order since it is not supported by substantial evidence on the record considered as a whole, as required by the amended Act. An examination of the record reveals that the Board ignored the evidence given by Seamprufe and gave credence only to the testimony given by Union witnesses.

The record discloses that there is neither substantial evidence on the record considered as a whole or a preponderance of testimony that Clendenon was discharged because of Union membership or activity; that the plant manager, Baum, knew that Clendenon was a member or active in the Union (R. 197, 198); that Sullivan, Clendenon's supervisor, who was the one who discharged Clendenon,

knew that Clendenon was active or a member of the Union. and that Clendenon was not discharged because her work was unsatisfactory (R. 232, 233, 238).

The record further reveals that the discharge of Webb was not an unfair labor practice because there was neither substantial evidence on the record considered as a whole or a preponderance of testimony that Baum, the plant manager, knew that Webb was a member of the Union.

Furthermore, there was no substantial evidence on the record considered as a whole or a preponderance of testimony that Seamprufe violated Sections 8(a)(1) or 8(a)(2) of the Act.

It is submitted that the decree of the Court below enforcing the Board's order is contrary to the provisions of the amended Act and, because the hearing was contrary to due process, there is presented an important issue of federal law, which has not been but should be resolved by this Court.

CONCLUSION

Because of the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

SEAMPRUFE, INCORPORATED,
Petitioner,
By NATHANIEL H. JANES,
Attorney for Petitioner,
Office and P. O. Address,
30 Broad Street,
New York 4, New York.

April 1951

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp., Secs. 141, et seq.) are as follows:

"Sec. 10(b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners

thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize such recommended order shall become the order of the Board and become effective as therein prescribed.

"10(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia) or if all the circuit courts of appeals to which application may be made are in vacation any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practices in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive." * * *

2. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, et seq.) are as follows:

"SEC. 7. (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

SEC. 10 (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 or 8 otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 39

SEAMPRUFE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 345-352) is reported at 186 F. 2d 671. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 31-70) are reported at 82 NLRB 892.

JURISDICTION

The decree of the court below (R. 353-356) was entered on February 19, 1951. Petitioner's application for rehearing, filed on March 9, 1951 (R.

357-363), was denied on March 19, 1951 (R. 365). The petition for a writ of certiorari was filed on May 1, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether petitioner was denied due process because two unfair labor practice complaints growing out of a single labor dispute—one against petitioner-employer, the other against a union and its agent—were consolidated pursuant to the Board's procedural rules and prosecuted for the Board by one attorney.

2. Whether the Board's findings of fact are supported by substantial evidence on the record considered as a whole.

STATUTE AND RULE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), and of Board Rules and Regulations Series 5, Section 203.33, 12 Fed. Reg. 5660, are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

A. *The facts as found by the Board*—Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on April 8, 1949, issued its findings of fact, conclusions of law, and order. The pertinent facts, as

proved by the evidence and found by the Board, may be summarized as follows:[1]

1. Lane, an organizer for the International Ladies Garment Workers' Union (hereinafter called the Union), arrived in McAlester, Oklahoma, on about November 20, 1947, and within the next few days began an organizational campaign among petitioner's employees (R. 40; 224). On November 25, petitioner's plant manager, Baum, called a meeting of all the employees and stated that petitioner had no place for unions (R. 40; 150-151, 169-170, 223, 250-251). Later that day and on the days following, he interrogated numerous employees about their union membership and sympathies (R. 40-41, 43; 151-152, 160, 170-171, 190, 197-198, 252-253, 261-263, 268-269, 280). On December 3, Baum again addressed the employees, promising wage increases and other new benefits (R. 42; 164, 165, 277-278). Shortly thereafter the wage increases became effective (R. 42, 44; 177, 178-179).

In the meanwhile, during the week following Lane's arrival in McAlester, Baum had notified petitioner's officials in New York of her presence (R. 43; 276). Thereupon, Caplin, petitioner's production manager and one of its directors (R. 42; 282), who had not planned to visit McAlester until some time in January (R. 43; 278), advanced the

[1] In this statement, record references preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

date of his visit and addressed the employees on December 9 (R. 42; 284, 286). He repeated Baum's promises and pledged additional benefits (R. 42; 158-159, 165-167, 179-180, 191, 211-212, 278-280, 287).

2. On December 8, Baum, who had been manager of petitioner's plant at Easton, Pennsylvania, before coming to McAlester (R. 40; 250), and who was thoroughly familiar with the Seamprufe Employees Association at Easton (R. 275),[2] suggested to the assembled employees the advantages of forming a similar organization (R. 42, 47; 198, 281, 289-290).[3] To this end, one of the employees posted a notice near the plant time clock, meetings were conducted in the plant within the next ten days, and a Seamprufe Employees Association was formed at McAlester (R. 45; 155, 158, 161, 162-163, 172, 281, 290, 291). The Association's constitution provided for dues of ten cents per week, to be collected by check-off (R. 46; 302, 307, 308). Actually, however, no dues were ever collected and no arrangement beyond the constitutional provision was ever made for their collection (R. 54; 142-143, 289, 291-292, 293).[4]

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[2] This Association, which collected biweekly dues of ten cents checked off by petitioner, held social affairs and sent gifts to sick members (R. 275).

[3] Baum had previously made the same suggestion to several employees individually (R. 40-42; 152-153, 170-171, 191).

[4] The Association had never acquired any funds except for ten dollars earned at a social it sponsored and which its president still carried on her person at the time of the Board's hearing (R. 292-293, 296). No bills had been paid (R. 293)

The meetings of the Association in the plant were held with Baum's permission and he was present in the plant during each meeting (R. 45, 46; 156, 162, 173, 281). Members of the Association campaigned generally in its behalf in the plant on company time (R. 46; 181-184, 189). On one occasion, Baum stood nearby, watching and listening, while an employee campaigning for the Association interrupted another employee at her work and sought to persuade her that petitioner would leave town if the Union succeeded in organizing the plant, warning that petitioner would rather lose $50,000 than have the Union tell it what to do. Baum did not disavow the threat (R. 46-47; 184-188, 248-249). Some time later, when two employees who were officers of the Union local asked him for an increase in the piece rates, Baum replied that he could make no change then but that when "everything was settled and the Association got in," the rates would be corrected (R. 48; 192-193, 194-195).

3. Petitioner hired Virginia Webb on November 24, 1947 (R. 48; 213). The following day she encountered considerable difficulty in her work because of mechanical defects in her machine of which Baum was aware (R. 49; 215-217, 237-238, 240, 243-244, 245, 246-247, 249). After she was transferred to another machine, Baum compli-

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although substantial obligations had been incurred (R. 147, 295, 296, 297, 298). No minutes of any Association meetings had ever been kept (R. 147, 295).

mented her on her progress (R. 49; 217, 218, 266-267). At the conclusion of work that day, Webb left the plant in a cab with Union Organizer Lane, observed by Baum (R. 41, 49; 152, 171, 197, 218, 225-226). On November 26, finding that her original defective machine had been reassigned to her, she reported the matter to her supervisor. Shortly thereafter she was called into Baum's office where Baum discharged her, saying he did not believe that she wanted to work (R. 49; 217, 242). Her supervisor followed her back to the cloakroom and told her she did not know the reason for the discharge (R. 49; 217, 242-243).[5]

Edna Clendenon was hired on October 24, 1947 (R. 50; 195). She worked three days as a machine operator and then became an inspector (R. 50; 196). She was one of the employees interrogated by Baum regarding her union sympathies; at the same time, Baum told her he had heard she was "for" the Union and warned her to be sure she knew what she was doing (R. 41, 50; 197-198, 268-269). During the period she was employed as an inspector she filled in as a sewing machine operator

[5] Webb's supervisor recalled telling Webb on the day of her discharge that her work was improving (R. 244). She also testified that she did not recommend Webb's discharge (R. 245).

The head supervisor testified that it frequently takes longer than six weeks to determine whether an employee will prove competent (R. 49; 235). Caplin admitted stating in his speech that "when we hire a girl we give her 13 weeks to meet her goal," and that those who proved incapable of becoming machine operators need not worry because other work would be found for them (R. 49; 286-287).

when necessary (R. 51; 199, 269). None of the other inspectors ever did that work (R. 51; 208, 269). She was discharged on January 2, 1948, by the head supervisor who told her only that her services were no longer needed (R. 51; 200, 202, 231, 234).

B. *Proceedings before the Board*—In January, 1948, unfair labor practice charges were filed with the Board by the Union against petitioner (R. 21-23) and by petitioner against "Mavis Lane, Representative of the International Ladies Garment Workers Union" (R. 12-14).[6] Complaints were issued on both charges and the cases were ordered to be consolidated pursuant to Section 203.33 (b) of the Board's Rules and Regulations, Series 5 (Appendix, *infra,* p. 16), one attorney being assigned to represent the Board in the consolidated proceedings (R. 14-16, 23-29, 30, 31).

The Board found that both petitioner and Union Organizer Lane had violated the Act. (The Board's finding and order against Lane (R. 63-70), of only incidental relevance here, are sufficiently summarized in note 6 below. As to petitioner, the Board concluded: (1) that it had interfered with,

[6] Petitioner's charges were based on threats Lane had made to some of petitioner's employees during her organizing campaign. Although the complaint issued on these charges named "Mavis Lane *and* International Ladies Garment Workers Union" (R. 14; italics added), the Board approved the trial examiner's finding that the charges were directed only against Lane and affirmed his dismissal of the complaint against the Union (R. 63). Lane herself was found to have violated Section 8 (b) (1) (A) of the Act and an appropriate order was issued against her (R. 63-64, 66-68, 70).

restrained, and coerced its employees, violating Section 8 (a) (1) of the Act, by its offers of a wage increase and other benefits significantly timed to coincide with the Union's campaign and by interrogating its employees concerning their membership in or sympathy with the Union (R. 44-45, 55, 62-63). (2) That by recommending formation of the Association, by permitting Association meetings in the plant, by failing to disavow known threats discouraging membership in the Union, by conditioning wage increases upon the success of the Association, and by the entire course of its conduct in violation of Section 8 (a) (1), petitioner had contributed support to the Association in violation of Section 8 (a) (2) (R. 48, 62). (3) That petitioner had discharged Webb and Clendenon for union activities, violating Section 8 (a) (3) (R. 50, 51, 62-63).

The Board's order (R. 64-66, 68-69) requires cessation of petitioner's unfair labor practices, reinstatement of the wrongfully discharged employees with back pay, and the posting of appropriate notices.

C. *Proceedings in the Court of Appeals*—In granting enforcement of the Board's order against petitioner,[7] the court below pointed out that the Board's attorney represented the Board, not the private parties, and held that his designation to

[7] The order against the Union's organizer, Lane, was also enforced (R. 346-349).

handle both cases was a proper exercise of the Board's discretion (R. 351-352). Secondly, having conducted an "examination of the entire record" (R. 349), the court held that the Board's order was supported by substantial evidence (R. 352). A petition for rehearing (R. 357-363), urging that the standard of review prescribed by Section 10 (e) of the Act as construed by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, had not been applied by the court, was denied (R. 365).

ARGUMENT

1. As the short and plainly correct answer of the court below makes clear (R. 351-352), petitioner's claim that it was denied due process because the General Counsel assigned one attorney to prosecute the two consolidated complaints rests upon an obvious misconception. The General Counsel and the attorney he designated acted neither for petitioner nor for the Union or its organizer, but "on behalf of the Board" (Section 3 (d) of the Act, *infra,* p. 14), which "asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 364. It was this public right which was vindicated when both petitioner and the Union organizer were found to have committed, and ordered to cease, unfair labor practices. It is for the economical and expeditious per-

formance of its public duty that the Board has adopted the rule, appropriately applied in this case involving a single labor dispute, that proceedings in the same region may be consolidated whenever "the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay * * *." Rules and Regulations, Series 5, Section 203.33 *infra*, p. 16 [8]

That petitioner was in no way prejudiced by the designation of one Board attorney to handle both complaints is amply demonstrated by the absence of any concrete suggestion of injury in the petition for certiorari itself.[9] Throughout the Board's proceedings, petitioner was represented by its own counsel (R. 31, 73). Thus, despite its vigorous invocation of due process, petitioner was never misled by its own fallacious contention that it was a "client" of the Board. "Due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market St. Ry.*

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[8] Board's Rules and Regulations, Series 6, effective March 1, 1951, continue the consolidation provision involved here in Section 102.33, 16 Fed. Reg. 1934, 1940.

[9] Petitioner's statement (Pet. 4) that the Board's attorney "presented the case against the Union and Mavis Lane after having consulted with Seamprufe's [petitioner's] witnesses regarding Seamprufe's charge" merely illustrates petitioner's refusal to recognize that Board proceedings are not private litigation. Witnesses interviewed by the Board's attorney in preparing the Board's case against the Union and its agent were "Seamprufe's" only in the vague and inapposite sense that Seamprufe presumably hoped the Board would sustain its charge.

Co. v. *Railroad Comm'n.*, 324 U. S. 548, 562. And see *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 351; *Lisenba* v. *California*, 314 U. S. 219, 236. There is no hint here of the kind of substantial issue which would warrant review by this Court.

2. Equally without substance is petitioner's contention (Pet. 6-11) that the court below unduly limited the scope of its review and should have reversed the Board's findings as being unsupported "by substantial evidence on the record considered as a whole * * *." Section 10 (e) of the Act, *infra*, p. 15. Following its practice in prior cases (see *National Labor Relations Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A. 10)), the court reached its conclusion as to the substantiality of the evidence in this case after an "examination of the entire record" (R. 349). As it has since pointed out in considering this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, the court has "always recognized [its] ultimate responsibility for the rationality of the Board's decision * * *." *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.*, 188 F. 2d 50, 52-53.

It is apparent, then, that the court below is among those which "have always applied the attitude reflected in" the review provisions of the Administrative Procedure Act and Taft-Hartley Act. *Universal Camera Corp.* v. *National Labor*

Relations Board, supra, at 490. Here too, "it is clear from the court's opinion in this case [and from its denial of the petition for rehearing, which urged a conflict with this Court's supervening decision in *Universal Camera*] that it in fact did consider the 'record as a whole,' and did not deem itself merely the judicial echo of the Board's conclusion." *Id.,* at 491. We submit, therefore, that since the Board's findings are plainly supported by the record considered as a whole (see pp. 3-7, *supra*), there is no occasion for further consideration by this Court of "a question which Congress has placed in the keeping of the Courts of Appeals." *Ibid.* Nothing in the record or in the petition for certiorari indicates even remotely that this is "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.*

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1951.

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*), are as follows:

Sec. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. * * * He shall have final authority, on behalf of the Board, * * * in respect of the prosecution of * * * complaints before the Board * * *.

* * * * *

Sec. 6. The Board shall have authority from time to time to make, amend, and rescind * * * such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *.

* * * * *

Sec. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred * * * for the enforcement of such order * * *. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or cer-

tification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 203.33 of the Board's Rules and Regulations, Series 5, 12 Fed. Reg. 5660, provided in pertinent part (see note 8, p. 10, *supra*):

> Whenever the General Counsel deems it necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay, he * * * may, at any time after a charge has been filed with a Regional Director pursuant to § 203.10, order that such charge and any proceeding which may have been initiated with respect thereto:
>
> * * * * *
>
> (b) Be consolidated with any other proceeding which may have been instituted in the same region * * *.

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